

The United States District Court
District of Massachusetts

FILED FREE PAID:

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10541
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Dr. Bruce W. Lowney, Plaintiff) Civil Action No.
)
v.)
)
Boston University, Boston)
University Benefits Plan, and)
Boston University General)
Surgical Associates, INC.)
Defendant)
)

01-10541 RCL

COMPLAINT

Now comes the plaintiff, Dr. Bruce W. Lowney, and for his complaint alleges as follows:

Parties

1. Plaintiff is an individual residing in Newton, Commonwealth of Massachusetts. At all times relevant herein he was duly licensed medical doctor with a specialty in general surgery.

2. Defendant, Boston University, (hereinafter "B.U.") is a charitable, educational institution with a principal place of business in Boston, Commonwealth of Massachusetts. As part of its graduate curriculum, B.U. operates a medical school in Boston known as Boston University School of Medicine (hereinafter "BUSM"). At all times relevant herein



plaintiff was a member of the BUSM teaching faculty. B.U. is an "employer" within the meaning of 29 U S C §1002 (5). Plaintiff is informed and believes and therefore avers that B.U. is an "administrator" within the meaning of 29 U.S.C. §1002 15(A) and that B.U. is a "fiduciary" within the meaning of 29 U.S.C. §1002 21 (A).

3. Defendant, Boston University General Surgical Associates, Inc., (hereinafter "BUGSA") is a corporation organized and existing pursuant to the laws of the Commonwealth of Massachusetts with a principal place of business at 88 East Newton St. Boston, Massachusetts. BUGSA is a faculty practice corporation for the Department of General Surgery of Boston University School of Medicine. BUGSA provides research, teaching and administrative services for BUSM and Boston Medical Center. Plaintiff is informed and believes that BUGSA is a "fiduciary" within the meaning of 29 U.S.C. § 1002 21A).

4. Defendant Boston University Benefit Plan (hereinafter the "Plan") is an "employee benefit plan" within the meaning of 29 U.S. C. §1002 (3).

Jurisdiction

5. This court's jurisdiction is based upon the Employee Retirement Income Security Act, ("ERISA") 29 U.S.C. §1132 (e) and (f).

Facts

6. Pursuant to a certain Agreement (hereinafter the "Agreement") dated April 1, 1995 by and between plaintiff and BUGSA, BUGSA appointed plaintiff a participating professional member of the corporation and an employee physician. Plaintiff is also a "participant" within the meaning of 29 U.S.C. §1002 (7).

7. The Agreement provided, *inter alia*, a compensation schedule for the plaintiff and further provided that the plaintiff's compensation would be paid by B.U. as a common paymaster and would include amounts due the plaintiff from BUGSA as well as any sums owed to plaintiff by B.U. as compensation.

8. The Agreement provided that plaintiff would be eligible to participate in the B.U. "benefit plans" made available generally under the B.U. common paymaster system, which included the Plan.

9. Plaintiff has fully performed his obligations under the Agreement.

10. At the very outset of his employment with BUGSA plaintiff informed the appropriate personnel that he did not wish to participate in the B.U. pension plan because plaintiff had, by that time, an adequately funded pension plan of his own. Plaintiff also informed the personnel that he did not wish to participate in the B.U. sponsored health insurance plan since he already was receiving health insurance benefits from another source.

11. Plaintiff is informed and believes and, therefore, avers that despite his request B.U. deducted certain amounts from his compensation ostensibly for the purpose of paying his medical insurance premiums and making contributions to a pension plan for B.U. faculty and employees all as part of the Plan.

12. Plaintiff is informed and believes and, therefore, avers that B.U. and BUGSA in violation of their fiduciary duties owed to the plaintiff deducted significant sums from plaintiff's compensation and made no contributions on his behalf to the Plan. The money withheld from the plaintiff's

compensation became an asset of the Plan by operation of law.

13. Plaintiff has made repeated requests to both B.U. and BUGSA for information concerning any amounts that may have been withheld from his compensation for pension benefits or health insurance benefits. B.U. and BUGSA acting through their authorized agents have refused to supply plaintiff with any of the information requested. It was only when plaintiff retained counsel did he obtain any information regarding the sums withheld from his compensation and even that information was so minimal that it was unenlightening.

14. Plaintiff is informed and believes and, therefore, avers that either B.U. individually or B.U. and BUGSA acting in concert and in violation of their fiduciary duties converted the money withheld from his compensation to their own use and benefit.

15. Plaintiff has made demand on BUGSA and B.U. for restitution of the funds that have been withheld from his compensation and not credited to any benefit plan on his behalf. Alternatively, plaintiff has requested that the money

withheld for pension benefits be paid in his name and account to the proper pension plan. The defendants have refused to make any reimbursement.

Count I Breach of Fiduciary Duty

16. Plaintiff repeats and realleges the allegations of paragraphs 1 through 15 as if set forth fully herein.

17. By withholding funds from plaintiff's compensation and not making any contribution to either a pension plan or a health insurance plan, B.U. and BUGSA committed a breach of their fiduciary duties and are liable to the Plan and derivatively to plaintiff for all sums wrongfully withheld.

Count II Restitution

18. Plaintiff realleges the allegations of paragraphs 1 through 17 as if set forth fully herein.

19. B.U. and BUGSA under, the guise of contributing to a benefit plan, wrongfully converted funds belonging to the plaintiff. Therefore this court under its equitable jurisdiction should

require each defendant to disgorge the money withheld and make restitution to the plaintiff.

Count III Injunctive Relief

20. Plaintiff realleges the allegations of paragraphs 1 through 19 as if set forth fully herein.

21. The defendant B.U. individually, or B.U. and BUGSA acting in concert have violated and continue to violate the express provisions of ERISA by withholding funds belonging to the plaintiff and not making any contribution to the Plan or alternatively returning the funds to the plaintiff. Therefore, the defendants should be enjoined from further violations of the statute.

Wherefore, plaintiff prays for judgement against the defendants in an amount that is meet and just under the circumstances and will fully compensate the Plan and himself for his losses including interest thereon. Further prays that this honorable court enforces his rights under the Plan or clarifies his rights to future benefits under the terms of the Plan and that this honorable court orders the defendants to

make restitution to the plaintiff and that the defendants be enjoined from further violations of ERISA.

Plaintiff prays that he be awarded his attorneys fees and costs in bringing this action pursuant to 29 U.S.C. § 1132 (g) (1).

Dr. Bruce W. Lowney,
by his attorney


Richard F. McCarthy
BBO No. 328580
Willcox, Pirozzolo & McCarthy
50 Federal Street
Boston, MA 02110
(617)482-5470 Fax(617)523 1572

Dated
3/28/01

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I (a) PLAINTIFFS

DR. BRUCE W. LOWNEY

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Middlesex
(EXCEPT IN U.S. PLAINTIFF CASES)(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)
Richard F. McCarthy
Willcox, Pirozzolo & McCarthy, P.C.
50 Federal Street
Boston MA 02110**II. BASIS OF JURISDICTION**

(PLACE AN X IN ONE BOX ONLY)

<input type="checkbox"/> 1 U.S. Government Plaintiff	<input checked="" type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)
<input type="checkbox"/> 2 U.S. Government Defendant	<input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES

(For Diversity Cases Only)

(PLACE AN X IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

	PTF	DEF	PTF	DEF	
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business in This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. CAUSE OF ACTION

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE A BRIEF STATEMENT OF CAUSE)

DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

Violation of ERISA, 29 U.S.C. §1001 et. seq.

V. NATURE OF SUIT (PLACE AN X IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance	<input type="checkbox"/> PERSONAL INJURY	<input type="checkbox"/> 610 Agriculture	<input type="checkbox"/> 422 Appeal	<input type="checkbox"/> 400 State Reapportionment
<input type="checkbox"/> 120 Manne	<input type="checkbox"/> 310 Airplane	<input type="checkbox"/> 620 Other Food & Drug	<input type="checkbox"/> 423 Withdrawal	<input type="checkbox"/> 410 Antitrust
<input type="checkbox"/> 130 Miller Act	<input type="checkbox"/> 315 Airplane Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 28 USC 158	<input type="checkbox"/> 430 Banks and Banking
<input type="checkbox"/> 140 Negotiable Instrument	<input type="checkbox"/> 320 Assault, Libel & Slander	<input type="checkbox"/> 630 Liquor Laws	<input type="checkbox"/> 28 USC 157	<input type="checkbox"/> 450 Commerce/ICC Rates/ etc.
<input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment	<input type="checkbox"/> 330 Federal Employers' Liability	<input type="checkbox"/> 640 R.R. & Truck	<input type="checkbox"/> 440 Deportation	<input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations
<input type="checkbox"/> 151 Medicare Act	<input type="checkbox"/> 340 Manne	<input type="checkbox"/> 650 Airline Regs	<input type="checkbox"/> 810 Selective Service	<input type="checkbox"/> 850 Securities/Commodities/ Exchange
<input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)	<input type="checkbox"/> 345 Manne Product Liability	<input type="checkbox"/> 660 Occupational Safety/Health	<input type="checkbox"/> 875 Customer Challenge	<input type="checkbox"/> 891 Agricultural Acts
<input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits	<input type="checkbox"/> 350 Motor Vehicle	<input type="checkbox"/> 690 Other	<input type="checkbox"/> 12 USC 3410	<input type="checkbox"/> 892 Economic Stabilization Act
<input type="checkbox"/> 160 Stockholders' Suits	<input type="checkbox"/> 355 Motor Vehicle Product Liability	<input type="checkbox"/> PERSONAL PROPERTY	<input type="checkbox"/> 661 HIA (1958)	<input type="checkbox"/> 893 Environmental Matters
<input type="checkbox"/> 190 Other Contract	<input type="checkbox"/> 360 Other Personal Injury	<input type="checkbox"/> 370 Other Fraud	<input type="checkbox"/> 662 Black Lung (923)	<input type="checkbox"/> 894 Energy Allocation Act
<input type="checkbox"/> 195 Contract Product Liability		<input type="checkbox"/> 371 Truth in Lending	<input type="checkbox"/> 663 DWIC/DRWW (405(g))	<input type="checkbox"/> 895 Freedom of Information Act
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	664 SSID Title XVI	<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice
<input type="checkbox"/> 210 Land Condemnation	<input type="checkbox"/> 441 Voting	<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 665 IRS (405(g))	<input type="checkbox"/> 950 Constitutionality of State Statutes
<input type="checkbox"/> 220 Foreclosure	<input type="checkbox"/> 442 Employment	<input type="checkbox"/> Habeas Corpus	<input type="checkbox"/> FEDERAL TAX SUITS	<input type="checkbox"/> 890 Other Statutory Actions
<input type="checkbox"/> 230 Rent Lease & Ejectment	<input type="checkbox"/> 443 Housing/Accommodations	<input type="checkbox"/> 530 General	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	
<input type="checkbox"/> 240 Torts to Land	<input type="checkbox"/> 444 Welfare	<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 871 IRS - Third Party	
<input type="checkbox"/> 245 Tort Product Liability	<input type="checkbox"/> 440 Other Civil Rights	<input type="checkbox"/> 540 Mandamus & Other	<input type="checkbox"/> 26 USC 7609	
<input type="checkbox"/> 290 All Other Real Property		<input type="checkbox"/> 550 Other		

VI. ORIGIN

(PLACE AN X IN ONE BOX ONLY)

<input checked="" type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed from State Court	<input type="checkbox"/> 3 Remanded from Appellate Court	<input type="checkbox"/> 4 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from another district (specify) _____	<input type="checkbox"/> 6 Multidistrict Litigation
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Appeal to District Judge from Magistrate Judgment

VII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION
 UNDER F.R.C.P. 23**DEMAND \$**
Equitable ReliefCheck YES only if demanded in complaint:
JURY DEMAND: YES NO**VIII. RELATED CASE(S)** (See instructions):
IF ANY

None

JUDGE _____ DOCKET NUMBER _____

DATE
3/28/01SIGNATURE OF ATTORNEY OF RECORD


1. TITLE OF CASE (NAME OF FIRST PARTY ON EACH SIDE ONLY) Dr. Bruce W. Lowney
v. Boston University

2. CATEGORY IN WHICH THE CASE BELONGS BASED UPON THE NUMBERED NATURE OF SUIT CODE LISTED ON THE CIVIL COVER SHEET. (SEE LOCAL RULE 40.1(A)(1)).

I. 160, 410, 470, 823, REGARDLESS OF NATURE OF SUIT.

II. 195, 368, 400, 440, 441-444, 540, 550, 625, 710, 720, 730, 740, 790, 791, 810, 830, 840, 850, 870, 892-894, 895, 950.

III. 110, 120, 130, 140, 151, 190, 210, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 370, 371, 380, 385, 450, 891.

IV. 220, 422, 423, 430, 460, 510, 530, 610, 620, 630, 640, 650, 660, 690, 810, 861-865, 870, 871, 875, 900.

V. 150, 152, 153.

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3. TITLE AND NUMBER, IF ANY, OF RELATED CASES. (SEE LOCAL RULE 40.1(E)).
None

4. HAS A PRIOR ACTION BETWEEN THE SAME PARTIES AND BASED ON THE SAME CLAIM EVER BEEN FILED IN THIS COURT?
NO

5. DOES THE COMPLAINT IN THIS CASE QUESTION THE CONSTITUTIONALITY OF AN ACT OF CONGRESS AFFECTING THE PUBLIC INTEREST? NO.
IF SO, IS THE U.S.A. OR AN OFFICER, AGENT OR EMPLOYEE OF THE U.S. A PARTY? (SEE 28 USC 2403) _____

6. IS THIS CASE REQUIRED TO BE HEARD AND DETERMINED BY A DISTRICT COURT OF THREE JUDGES PURSUANT TO TITLE 28 USC 2284?
NO

7. DO ALL PARTIES IN THIS ACTION RESIDE IN THE CENTRAL SECTION OF THE DISTRICT OF MASSACHUSETTS (WORCESTER COUNTY) - (SEE LOCAL RULE 40.1(C)). YES _____ OR IN THE WESTERN SECTION (BERKSHIRE, FRANKLIN, HAMDEN OR HAMPSHIRE COUNTIES)? - (SEE LOCAL RULE 40.1(D)). = YES _____
NO _____

8. DO ALL OF THE PARTIES RESIDING IN MASSACHUSETTS RESIDE IN THE CENTRAL AND/OR WESTERN SECTIONS OF THE DISTRICT? YES NO (a) .. IF YES, IN WHICH SECTION DO THE PLAINTIFF RESIDE? _____

9. IN WHICH SECTION DO THE ONLY PARTIES RESIDING IN MASSACHUSETTS RESIDE? EASTERN

10. IF ANY OF THE PARTIES ARE THE UNITED STATES, COMMONWEALTH OF MASSACHUSETTS, OR ANY GOVERNMENT AGENCY OF THE U.S.A. OR THE COMMONWEALTH, DO ALL OTHER PARTIES RESIDE IN THE CENTRAL SECTION _____
OR WESTERN SECTION N. A.

(PLEASE TYPE OR PRINT)
ATTORNEY'S NAME Richard F. McCarthy
ADDRESS Willcox, Pirozzolo & McCarthy, P.C. *DISTRICT COURT
MA 02110*
TELEPHONE NO. 617-482-5470